

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
APPENDIX**

Offset 75-1065

PBS

75-1065

United States Court of Appeals
for the Second Circuit

UNITED STATES OF AMERICA,

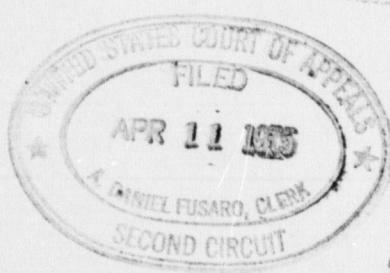
Plaintiff-Appellee,

v.

FRANK WINGATE,
KENNETH LUKE SMITH,

Defendants-Appellants.

Appendix of Appellant SMITH



BARLOW, KATZ & BARLOW
Attorneys for
defendant-appellant
KENNETH LUKE SMITH
233 Broadway
New York, N.Y. 10007
233-0570

PAGINATION AS IN ORIGINAL COPY

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JUDGE FRANKEL

74 CRIM. 860

ABSTRACT OF COSTS (07)	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,					
Clerk, 1 + 2					
Marshal,					
Attorney,					
Costs, fines, etc. 21					
Witness fees 846,812,841(a)(1),(b).					
Consp. to viol. Fed. Narco. Laws. (Ct.1)					
Distr. & possess. w/intent to dist.					
Heroin, I (Cts. 2&3)					
(Three Counts)					

DATE	PROCEEDINGS
-10-74	Filed indictment.
-23-74	Both defts. (attys. present) Plead not guilty. Motions returnable in 10 day Both defts. released on their own recognizance. Case assigned to Judge Frankel for all purposes. Motley, J.
10-7-74	KENNETH L.SMITH- Filed notice of appearance by Robert A.Katz 233 B'Way NYC 233-0570
2-5-74	KEENETH L.SMITH - Filed affdvt. of deft in support of motion to suppress a statement.
2-20-74	F.WENGATE - Filed affdvt. of T.M.Fortuin,AUSA in support of a writ..ret.I2-26-74----

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
12-23-74	BOTH DEFTS - Filed Govt's bill of particulars		
12-23-74	FRANK WINGATE - Filed defts memorandum of law.		
12-23-74	K.L.SMITH - Filed order that deft's application for inspection of the Grand Jury minutes is denied etc....Frankel,J.		
12-27-74	FRANK WINGATE - Jury Trial begun... KENNETH LUKE SMITH		
12-30-74	Trial cont'd..Defts motion to acquit granted as to COUNTS 2 & 3 as to each deft.		
12-31-74	Trial cont'd.		
1-2-75	Trial cont'd. & concluded. Jury returns a verdict of GUILTY on ct.l as to both deft's..Sentence 2-18-75..Deft's released on \$5,000 P.R.B. WINGATE bond to be co-signed by wife..Deft SMITH bond to be co-signed by common law wife..Both bonds to be signed by Jan.3-75.....Frankel,J.		
1-3-75	FRANK WINGATE - Filed personal recognizance bond unsecured in amt.of \$5,000.		
1-3-75	KENNETH LUKE SMITH - Filed personal recognizance bond unsecured in amt.of \$5,000.		
1-3-75	Filed Govt's request to charge		
1-3-75	Filed deft's requests to charge		
1-3-75	Filed notice of motion for deft Smith to examine Grand Jury minutes and to inspect and copy, for bill of particulars		
1-3-75	KENNETH LUKE SMITH - Filed deft's voir dire		
1-8-75	K.L.SMITH - Filed requests to charge jury		
1-8-75	Filed deft's Smith's voir dire		
1-8-75	Filed Govt's memorandum of law...		

DATE	PROCEEDINGS
Jan.17-75	Filed Writ of H/C ad Test. Ret. 12-26-74.....
2-18-75	FRANK WINGATE - Filed Judgment(Atty. John Curley, present) The deft is committed for imprisonment for a period of THREE YEARS... Pursuant to Section 3651, Ti.18, U.S. Code, as amended, deft will be confined in a jail type institution for a period of SIX MONTHS... The execution of the remainder of the sentence is suspended and deft is placed on probation for a period of THREE YEARS, TO commence upon expiration of confinement, subject to the standing probation order of this Court. Pursuant to the provisions of Ti.21, Section 841, U.S.Cole, the deft is placed on Special Parole for a period of THREE YEARS to commence upon expiration of confinement..... Deft. cont'd on present bail pending appeal..... FRANKEL, J.... Ent. on 2-19-75-----
2-18-75	KENNETH LIKE SMITH - Filed Judgment(Atty. Joyce K. Barlow, present) The Imposition of prison sentence is suspended and the deft is placed on probation for a period of THREE YEARS, subject to the standing probation order of this Court.. Deft is to continue in the program of drug therapy in which he is now participating, and that if he severs his connection with REALITY HOUSE before it is deemed to be desirable in the judgment of the people in charge of that program and the Probation Office, this may be considered as a factor possibly requiring the Court to consider the revocation of his probation!... FRANKEL, J... Ent.on 2-19-75-----
2-24-75	FRANK WINGATE - Filed notice of appeal from judgment of 2-18-75... Copy served on U.S. Atty. and mailed to deft at 1415 Bristow St. Bronx N.Y. 10459 Leave to appeal in forma pauperis is granted...Frankel, J.

P. H

FRANKEL, J.

SEP 23 1974

Both Dfts appear
& (atty Joseph Zelosse & Robert Katz
appear) Both Dfts plead n/g
Case assigned to Frankel, J. doa
Supervising Indictment ^{Sept 7/74} No. 810
for 8 days for M.D.C. Both Dfts
are RDR

AD Motley, J.

DEC 2 1974

AUSA Fokison
Hearing on by motion to suppress
commenced. Motion denied.
jury trial as to each defendant
atty present, commenced.

DEC 3 1974

Trial continued. By motions to
acqst granted as to Counts 2 & 3
as to each defendant.

Trial continued.

DEC 3 1974
JAN 2 1975

Jury return a verdict of Guilty
as to both defendants. Acqst
date Feb 18, 1975. Both dfts released
on \$5,000 P.R.O. Dft Wengate bound to
be re-preserved by wife. Dft Smith bound
to be re-preserved by common law wife. Both
bonds to be paid by ~~Feb 3~~ Jan 3, 1975.

Frankel, J.
K.W.

7-13

ACSA FORTIN

FEB 18 1975

dft WINGATE, atty (John Culley) pres. Senten-
to 3 yrs. Pursuant to Sec. 3651, T18, def is to be
confin'd in a Juyl Type Institution for a perio
of six (6) mos. Execution of remainder of
sentence suspended, defend. placed on Prob
for a d of 3 yrs following release. Spec.
Parole of 3 yrs. Dft ~~released~~ ^{comit} on \$5,000, P.R.B.
pending appeal

(d)

dft SMITH, atty (Joyce K. Barlow) pres.
T.S.S. 3 yrs probation. Spec Court of Prob.
def to continue in the program of drug therapy
in which he is now participating, and then
if he sever his connection with the Alcat-
House house it is deemed to be desirable
in the judgment of the people in case
of that program and the probation off
this may be conceded as a factor
possibly requiring the court to consider
the revocation of his probation.

Franklin J.


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA

- v -

FRANK WINGATE, and
KENNETH LUKE SMITH,

Defendants.

-----x
INDICTMENT

: (S) 74 Cr.

74 CRIM. 860

-----x
COUNT ONE

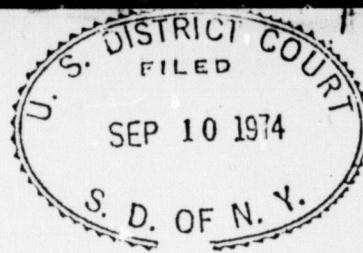
The Grand Jury charges:

1. From on or about the 11th day of June,
and continuously thereafter up to and including the date of
the filing of this Indictment, in the Southern District of
New York, FRANK WINGATE and KENNETH LUKE SMITH, the
defendants and others to the Grand Jury unknown, unlawfully,
intentionally and knowingly combined, conspired, confederated
and agreed together and with each other to violated Sections
812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States
Code.

2. It was part of said conspiracy that the said
defendants unlawfully, intentionally and knowingly would
distribute and possess with intent to distribute Schedule I
narcotic drug-controlled substances the exact amount thereof
being to the Grand Jury unknown in violation of Sections
812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States
Code.

MICROFILM

SEP 11 1974



HCB,Jr.:wp

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York.

(1) On or about June 13, 1974, the defendant WINGATE had a telephone conversation with an undercover officer of the Drug Enforcement Administration as to the price of narcotics and a proposed location for the transaction.

(2) On or about June 14, 1974, the defendant WINGATE had several telephone conversations pertaining to narcotics transactions from the Crotona Bar, at 1475 Boston Road, Bronx, New York.

(3) On or about June 14, 1974, the defendant

2

WINGATE exited the Crotona Bar, 1475 Boston Road, Bronx, New York, approached an automobile occupied by co-conspirators but not co-defendants Jacob F. Edwards and Bernice Jones, conversed with them and returned to the Crotona Bar.

(4) On or about June 14, 1974, the defendant WINGATE accepted \$3,100 from an undercover officer of the Drug Enforcement Administration as advance payment for a sale of narcotics.

(5) On or about June 14, 1974, the defendant WINGATE exited the Crotona Bar, entered an automobile occupied by co-conspirators but not co-defendants Jacob F. Edwards and Bernice Jones, and the vehicle proceeded to the vicinity of 155th Street and St. Nicholas Avenue, Manhattan, New York, and entered the New Fat Man Steak House.

HCB,Jr.:wp

(6) On or about July 1, 1974, defendant FRANK WINGATE used a public telephone at the Crotona Bar, Bronx, New York, to engage in a conversation concerning his pending sale of a quantity of heroin.

(7) On or about July 1, 1974, the defendants KENNETH SMITH and FRANK WINGATE traveled by automobile in the vicinity of the Crotona Bar, Bronx, New York.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

On or about the 14th day of June, 1974, in the Southern District of New York, FRANK WINGATE and KENNETH LUKE SMITH, the defendants, unlawfully, intentionally and

knowingly did attempt to distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-eighth kilogram of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A), and 846.)

COUNT THREE

The Grand Jury further charges:

On or about the 1st day of July, 1974, in the Southern District of New York, FRANK WINGATE and KENNETH LUKE SMITH, the defendants, unlawfully, wilfully and knowingly did attempt to distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-eighth kilogram of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A), and 846.)

Richard J. O'Brien
FOREMAN

PAUL J. CURRAN
United States Attorney

1 Jwh 3

2 government to prove them guilty beyond a reasonable doubt
3 before either of them may be convicted here. Defendants
4 in a criminal case don't have to prove their innocence,
5 they don't have to prove anything. They are as they come
6 here and as they sit here now presumed to be innocent and
7 that presumption is enough in itself to require you to acquit
8 them until or unless you are convinced of their guilt beyond
9 a reasonable doubt.

10 Now, a defendant having no burden to present
11 evidence has an absolute right to judge for himself and with
12 his lawyer whether or not he will take the stand. And you
13 know, you have been observing, that one defendant chose
14 to testify, the other didn't. As to Mr. Smith who didn't
15 take the stand, remember that it is his absolute right not
16 to do so. The fact that he didn't take the stand may not serve
17 to prejudice him in any way. You should not consider it
18 against him.

19 To put it more simply, the fact that he didn't
20 take the stand should play no part in your deliberations
21 whatsoever.

22 Now, we have all talked here repeatedly, as it is
23 a fundamental and basic thing, about the burden of proof
24 beyond a reasonable doubt. Let me reiterate on that and
25 attempt to convey to you the sense of what it means. It means

1 jwh4

2 what the words literally undertake to convey; it means a
3 doubt that has its origin in your reason applied to the
4 record of evidence in the case before you. The notion of
5 proof beyond a reasonable doubt is not an excuse to avoid
6 performing an unpleasant duty. It is not a guise or pretext
7 for extending sympathy to anyone.

8 A reasonable doubt is the kind of doubt that
9 would cause a prudent person to hesitate before taking
10 action in some matter of importance to himself or herself.
11 If I may spell that out a little bit, if you have, as all
12 of us have from time to time, some serious, important de-
13 cision to make and if you proceed to view coolly and ob-
14 jectively all the facts and factors that have a bearing on
15 that decision and at the end of that review you find yourself
16 beset by uncertainty and unsure of your judgment you have
17 a reasonable doubt.

18 The converse of that is also true. If you have
19 such a decision to make and if you proceed to the kind of
20 objective consideration I described to everything bearing
21 on that decision and if at the end of that process you
22 didn't have that kind of uncertainty or reservation then you
23 would not have a reasonable doubt.

24 Proof beyond a reasonable doubt does not mean proof
25 beyond any conceivable doubt or proof to a positive or

1 jwh5

2 mathematical certainty. If it meant that then nobody could
3 ever be convicted in any trial in a criminal case concerned
4 with trials or with issues of fact. It is in the nature
5 of issues about matters of fact, and most clearly about
6 matters of fact that lie in the past, that they are not
7 capable of being proved one way or another beyond any doubt
8 or to a positive or mathematical certainty. The law deals
9 in probabilities and we do here in the criminal law as well.
10 So when we speak of proof beyond a reasonable doubt, we
11 don't mean proof beyond any doubt.

12 On the other hand, though, I have spoken also
13 of probabilities, it is important for you now to have in mind
14 that the probability of guilt must be a very high one in
15 a criminal case before a jury may convict, that the burden
16 of proof on the government is a very high one and that you may
17 convict only if in the end your minds are free of the kind
18 of uncertainty and the kind of reservation I have spoken
19 about.

20 Now, with those thoughts in view let's approach
21 the specific case before you and the specific problems it
22 will present for your decision.

23 First, by way of background, and perhaps to make
24 intelligible some of those numbers and letters in the in-
25 dictment as you may hereafter be looking at it, let me call

1 jwh6

2 your attention or remind you that in the federal system
3 there are no crimes except as Congress in laws it has
4 enacted has declared certain conduct to be criminal. That
5 is to say, we don't have common law crimes as used to exist
6 in our legal system. All crimes are defined by statute.
7 And so underlying every indictment in the federal court,
8 underlying this indictment, there is some statute or statutes,
9 some laws enacted by the Congress.

10 Now, the laws that underlie this case are laws
11 in which Congress has said that it is unlawful to distribute
12 or to possess with intent to distribute a certain so-called
13 narcotic drug controlled substance. One such substance is
14 heroin. And so it is unlawful to distribute or possess with
15 intent to distribute the drug called heroin.

16 It is also under those same statutes unlawful
17 to conspire to do these things. And as you know, in shorthand
18 terms at least, this case is about an alleged conspiracy
19 to distribute or possess with intent to distribute heroin.

20 Now, this indictment as it now stands and as
21 copies have been placed before you contains a single count.
22 You may recall there were three counts when the case originally
23 came on to be tried. The second and third counts have been
24 withdrawn from you for reasons of law that need not concern
25 you. You are concerned with this charge of an illegal

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FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

1 jwh7

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2 conspiracy to deal in heroin.

3 Before we go to the specifics of that charge
4 and the issues you will consider, let me just say very
5 generally a few words about the nature of the concept of
6 conspiracy in our law.

7 A conspiracy, as I shall be repeating in a minute
8 or so, is an agreement or combination to work together by
9 two or more people to commit some illegal or criminal act.
10 The gist of this concept of conspiracy is the agreement or
11 understanding or combination and because that is the heart
12 of the matter in our law, as in our systems of law, a con-
13 spiracy may be a crime separate and complete in itself
14 apart from the so-called substantive offense which is the
15 object or purpose or goal of the conspiracy.

16 Now, let me make that long sentence intelligible
17 to you. Let's consider the crime of homicide which is unrelated
18 with anything which you have to concern yourselves with here.
19 You can have a conspiracy to commit a murder and the crime
20 of conspiracy could be made out to be established, the people
21 accused of conspiracy could be convicted even though the
22 murder was never actually carried out because as I say the
23 gist of the crime of conspiracy is the unlawful agreement
24 plus an overt act or more than one overt act - and I will be
25 talking with you about that. And as I say you can have the

1 jwh8

2 conspiracy though the substantive offense was never com-
3 pleted.

4 Now, here the alleged substantive offense was
5 the possession of heroin with intent to distribute it or
6 the distribution of heroin. And there is no substantive
7 offense claimed or established as the case comes before you
8 for your consideration. There is a charge of conspiracy,
9 the unlawful agreement and that is the thing that you will
10 be concentrating on in your deliberations.

11 Now, for your convenience, as I said, and for
12 the convenience of all of us I have given you that indictment.
13 I am not going to read it to you and I would just as soon you
14 don't spend time on reading it while we go on with these in-
15 structions, but it may be convenient and useful to you to
16 refer to it as we go along.

17 This indictment, as you see looking at the first
18 page, charges a conspiracy that began on or about June 11th
19 of what is now last year and extended for a period up to
20 the filing of the indictment in the form of a pleading.

21 It says in the first paragraph that it was a
22 conspiracy in which the defendants with others, known or
23 unknown to the Grand Jury, agreed and combined and so forth
24 to violate certain enumerated statutes. I have told you about
25 those statutes. They forbid possessing with intent to

1 Jwh9

2 distribute heroin and other narcotic substances.

3 And the second paragraph on the first page says
4 that the conspiracy was designed and had as part of it the
5 object of the distribution and possession with intent to
6 distribute. Then if you will just look by way of anticipation
7 on the next page, you will see that it contains a list
8 running on to page 3 of 7 overt acts so called. And I shall
9 be talking to you about them and their significance in this
10 case in a little while.

11 At this point let me tell you, because this now
12 focuses you on exactly the matters you are to think about,
13 let me tell you the essential elements, so called, of this
14 offense of conspiracy as charged in this case.

15 Before you can convict either defendant you must
16 be satisfied beyond a reasonable doubt on each and every one
17 of three essential elements. Each and every one means that
18 if you are not satisfied on any one of them you would have
19 to acquit. For a conviction the government must prove
20 all three.

21 Now, let me tell you those three essential elements.

22 First that for some period of time between June 11,
23 1974, and the arrest in this case on the morning of July 2nd
24 there was a conspiracy of the kind the government alleges
25 in this indictment, namely a conspiracy that had as its

1 jwh10

2 object the unlawful distribution of heroin or the possession
3 of heroin with the intent to distribute it.

4 The second essential element is the requirement
5 of proof that the defendants here on trial, or either of
6 them, knowingly and intentionally participated in the con-
7 spiracy.

8 The third essential element is that one of the
9 conspirators committed at least one of the overt acts set
10 forth in the indictment during the conspiracy and for its
11 purpose.

12 Let me go back over each of those essential ele-
13 ments and explain them just a little bit. As to the first,
14 the requirement of proof that the conspiracy alleged actually
15 existed goes back to the basic concept I told you about before,
16 and since it is basic, I will be repeating a little bit
17 the things that I said earlier. A conspiracy, the purposes
18 of this and in most criminal cases is a combination or
19 agreement between two or more persons to act together to
20 take concerted action to accomplish some criminal purpose.
21 As I said it is the unlawful agreement or combination that
22 is the gist of this crime of conspiracy.

23 It is frequently said that a conspiracy is a kind
24 of partnership in crime. So in this setting you hear words
25 familiar to people like agreement and partnership. You

1 jwh11

2 understand, though, that it isn't necessary in a conspiracy
3 case for the government to prove an agreement or a partner-
4 ship in any formal or standard or familiar sense of those
5 words in the law and in life. Your common sense will tell
6 you that if and when people get together to agree on the
7 commission of some crime, if and when people enter into
8 a criminal conspiracy much is left unexpressed, much is left
9 to tacit and informal understanding. But you will also under-
10 stand that there must have been what amounts to a clear
11 understanding between two or more conspirators to engage
12 in the illegal enterprise before this element, this first
13 and basic element of conspiracy could be made out.

14 So since you are determining whether that has
15 been proved and since you will understand that if a conspiracy
16 exists it is sometimes proved in ways other than by showing
17 the language of agreement or standard contract terms, you
18 will understand that in this as in many cases charging con-
19 spiracy you will be looking at the pattern of conduct that
20 the evidence makes out to you, you will be looking for the
21 course of events and relationships, however long or short,
22 you will be looking to put together all these events
23 and actions and relationships and to determine from that
24 kind of synthesis whether or not the government has estab-
25 lished beyond a reasonable doubt that the conspiracy alleged

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1 jwh12

2 actually existed.

3 Now, I told you, and I repeat, that a conspiracy
4 may be made out, may be proved whether or not the object,
5 the substantive offense was ever carried out. The conspiracy
6 may exist, in other words, whether or not it succeeded in
7 achieving whatever its purpose may have been.

8 You will be then reviewing all the evidence.
9 You will be determining from that evidence what it shows
10 and what it may fail to show. And taking all the evidence
11 together you will decide whether the kind of illegal agreement
12 or combination or understanding alleged in this indictment
13 was in existence during the period alleged in the indictment.

14 Now, I said during the period because if you find
15 that there was a conspiracy, the exact length of its life
16 is not a matter of any special consequence here. I told you,
17 and you see it before you, that the charges of the conspiracy
18 extended from June 11th up to the date of the indictment.
19 The government isn't required to prove that the conspiracy
20 existed for the whole of that period, or indeed anything like
21 it.

22 If you find that a conspiracy like the one alleged
23 has been proved to have existed so far as its length or
24 duration is concerned it would be sufficient if it existed
25 for any time during that period alleged in the indictment.

1 jwh13

2 A conspiracy, as you would know, and as I instruct
3 you in any event, may exist, may be completed, may be a
4 full agreement of the kind the law denounces even though it
5 lasts only hours. You must find some duration, but I repeat
6 it need not endure for as long as the period alleged in the
7 indictment.

8 Now, if you are not satisfied that there was
9 such a conspiracy for some time during the period alleged
10 your task in this case will be ended and you will be expected
11 and required to return a verdict of not guilty as to both
12 defendants.

13 If you find the conspiracy has been proved,
14 that being the first essential element, you will, at least
15 if you proceed logically, turn to the second essential
16 element, the requirement of proof of participation or
17 membership in a conspiracy.

18 That question of alleged membership must be con-
19 sidered and decided by you with specific and particular
20 and individual reference to each of the two specific and
21 separate individuals on trial before you. And what I am
22 saying in saying that to you is that in a conspiracy case,
23 as in others, the question of the guilt or innocence in our
24 law is an individual one and each individual has a right
25 to be considered on his own for this kind of serious purpose.

Wh 14

2 We don't follow and you won't follow doctrines of guilt
3 by association in considering this conspiracy case.

So the participation of my defendant, or either
of these defendants, in a conspiracy. If you find there was
a conspiracy, needs to be judged, needs to be considered
by considering what the evidence shown as to his own words,
his own action, his own intent. These things, as in many
areas of human understanding and of factual investigation,
will of course be considered by you in relation, where you
find there is relation, in relation to these statements and
actions and events involving other people. That is to say,
you knew whether in a law court or anywhere else that the
things that people do and the things that people say fre-
quently take on meaning. Frequently become intelligible only
when they are considered in relation to the things other
people do and the things other people say.

18 And so to the extent that you find relationship,
19 to the extent that you find events following one another,
20 to the extent that you find events interrelating with each
21 other, obviously those relationships will have a bearing on
22 your understanding and on your judgment.

23 But then in the end you will also understand
24 that the question whether either Mr. Smith or Mr. Wingate
25 was a member of the alleged conspiracy will be a question to

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1 jwh15

2 be decided on the basis of what the evidence tells you about
3 him; about what he said or did or what he intended or what
4 he didn't do or say at the time here in question.

5 So to summarize that, you will focus on each in-
6 dividual. That may, it will require you to consider what
7 other people did and said at various times during the course
8 of this case. It results that in focusing on each individual
9 you are expected and entitled to look at all the evidence
10 before you and consider it in determining what it tells you
11 specifically about each of the two separate individual
12 defendants before you.

13 I have said you may and should look at all the
14 evidence and I hasten immediately to put two restrictions
15 or qualifications on that. In the particular setting of
16 this case there are two exceptions, and I think it will be
17 clear to you in any event that they exist, but I must
18 particularly instruct you about them.

19 You heard some evidence, to give you the first ex-
20 ception, of alleged dealings between the witness Tyre and the
21 defendant Wingate relating to times before the period alleged
22 in this indictment. Whatever that evidence does or doesn't
23 tell you I now instruct you that you may consider it only
24 as against the defendant Wingate. It has no bearing on
25 the defendant Smith.

1 jwh16

2 Now, secondly, we have a kind of reverse situation.
3 You have heard of statements said to have been made by Mr.
4 Smith following the arrest of both defendants in the early
5 morning of July 2nd. Any statements that you find were made
6 by Mr. Smith after the arrest may be considered only as
7 against Mr. Smith. They have no bearing or significance.
8 with respect to Mr. Wingate.

9 To find that a defendant was a member of a con-
10 spiracy you must find that he knew the unlawful purpose
11 of the enterprise and knowingly associated himself with it.
12 The government must establish beyond a reasonable doubt
13 that a defendant entered into a conspiracy aware of its
14 basic nature and its basic purpose and intending to parti-
15 cipate in carrying out that purpose. Here is a specific
16 criminal intent, the intent to violate the law in a narcotics
17 transaction about which I told you. And when I say the intent
18 to violate the narcotics laws that does not mean obviously
19 that to be found guilty a defendant must be shown to have
20 known of the specific statutes or enactments under which
21 he stands accused, but he must be shown to have known that
22 the kinds of narcotic transactions in which he was agreeing
23 to engage are transactions denounced, forbidden by the
24 criminal law.

25 Now, mere association with one or more conspirators

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2 or presence with one or more people who are conspiring to
3 commit a crime does not in itself make anybody a member of
4 a conspiracy. Similarly knowledge that there is a conspiracy,
5 that people with whom you are present are engaged in a
6 conspiracy, knowledge without participation is not sufficient.
7 What is necessary, to repeat what I have already told you,
8 is a showing that a defendant became associated with the
9 scheme or the plan or the transaction knowing its purpose
10 and intending himself to act in some way to bring about
11 or achieve that purpose.

12 If a person participates in that sense with
13 knowledge he may become a conspirator, a member of the
14 conspiracy even though he engages or participates in only
15 some parts of it.

16 Actually, whether or not it has any bearing on your
17 understanding of the evidence in this case it may be said,
18 because it is the law, that you can be a member of the con-
19 spiracy even though you don't know all the other members
20 of the conspiracy. The question in any event, to repeat
21 and summarize it, is whether a person has voluntarily joined
22 in the conspiratorial venture knowing what it was about
23 and desiring and intending by his own participation to
24 bring it to completion, to accomplish its objective.

25 The indictment charges, and the statute speaks

1 jwh18

2 in similar words, that these defendants intentionally
3 and knowingly conspired. And I have been talking about
4 membership, I have been talking about the knowledge
5 necessary before a membership in a conspiracy can be estab-
6 lished. You can't become a member of a conspiracy unaware,
7 in ignorance of what you are doing and what it is about.
8 And as I say, we covered that, but those words knowingly
9 and intentionally are used to identify a basic element in
10 the law, the element of criminal intent and so I dwell on
11 them and expand on them a little bit beyond what I talked
12 to you about in connection with this question of membership.

13 I say to you that although the words are central,
14 they are vital. They are not very complex, and they are not
15 very complicated in this case. In general, as background
16 to your consideration of this question of membership,
17 have in mind that when we speak of actions taken intentionally
18 and knowingly in the sense that concerns us here we are
19 speaking of things that are done deliberately, voluntarily,
20 purposely, with an awareness of the nature and object
21 and possible consequences of those actions, not things that
22 are done by mistake or accident or negligently or by in-
23 advertence.

24 As I said to you before, to act knowingly a person
25 does not need to know specifically that he is violating a

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2 particular law that he could cite or quote or identify,
3 but in this case again to make out that element of criminal
4 intent a defendant must be shown to have realized that he
5 was planning, agreeing to engage in transactions relating
6 to narcotics and to have known that such transactions were
7 forbidden somewhere by the criminal law governing his behavior.

8 These characteristics that make of knowledge
9 or intent cannot be proved by so-called direct evidence.
10 When you are talking of intent you are talking of the quality
11 or function of the human mind. It is a fact like other facts,
12 but it is a fact we are in the habit of ascertaining by
13 so-called circumstantial rather than direct evidence. We
14 don't commonly have means for looking into a person's mind
15 or knowing by direct observations what he believes and knows
16 or intends. So we are in the habit in our daily lives
17 and in the courtroom as well of relying on circumstantial
18 evidence to decide whether a person knows what he is doing,
19 whether he intends to be doing a particular thing, what his
20 motives and objects and desires may be in engaging in
21 particular conduct. And you will make that kind of study
22 of the evidence in this case for the purpose of ascertaining
23 from all the circumstance whether these defendants, or either
24 of them, knowingly and intentionally became members of the
25 conspiracy the government charges.

1 Jwh20

2 And now I come to the third and last of the three
3 essential elements. If you find there was a conspiracy;
4 if you find that either of those defendants were members
5 you may still not convict unless you are also satisfied
6 beyond a reasonable doubt that at least one of the overt
7 acts alleged in this indictment was committed during the
8 conspiracy and with the object of furthering the conspiracy.

9 A word or two about the theory of that. It is
10 the theory of our law generally, and in this particular case,
11 that people might talk about engaging in some criminal conduct
12 and then not make a single move or take a single step toward
13 carrying out that kind of illegal enterprise. It is our theory
14 that if no such single act or step occurred people ought not
15 to be found guilty of crime because of mere talk of the
16 nature of the agreement. So it is required before the crime
17 of conspiracy may be found to have been committed at least
18 one overt act must be proved.

19 When you turn to pages 2 and 3 of this indictment
20 as you can see there are 7 overt acts alleged. Overt acts
21 may be things that are not in themselves criminal or wrongful.
22 It is not criminal or wrongful to have a conversation in
23 a car or to be in a car and that kind of behavior is included
24 among the things alleged under the heading of overt acts.

25 Nevertheless, I tell you that one of those things

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2 must be proved before the conspiracy charge may be completely
3 established. In telling you that I should also say that
4 the government is not required to prove more than one, but
5 it must prove at least one of those acts committed by at
6 least one conspirator before the crime may be established.

7 Now, those are the essential elements that you
8 are to consider. Let me give you some general thoughts
9 that are also rather standard about the ways you will go about
10 considering these things and the responsibilities you will
11 have together in the jury room.

12 One of your tasks, as you know, is to judge, to
13 appraise the credibility of witnesses. You rely on the
14 witnesses to tell you what happened and the extent to which
15 you may rely on them involves you in standard and critical
16 jury work - the assessment of credibility.

17 There is nothing technical and there is nothing
18 specially legalistic about that subject even though it is
19 a regular and necessary part of jury instructions.

20 Lawyers and judges are not specially expert
21 in judging credibility. It is not a specialty to people
22 legally trained - at least that is the theory of our system
23 of trial by jury. We bring to the courthouse citizens like
24 yourselves, normally not trained in the technicalities of
25 the law in the belief that you will bring with you your

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2 collective wisdom, experience, knowledge of people and
3 the way the world works and that you will apply those things
4 to the witnesses you have seen and heard in making your
5 judgments of credibility.

6 You will be asking together how each of these
7 witnesses impressed you. Did the witness seem to be frank
8 and direct and forthright? Did he seem to know what he was
9 talking about? Did he seem, if he knew what he was talking
10 about, to have a purpose to tell you accurately what he knew?

11 You can compare direct with cross-examination.
12 You may consider the intrinsic plausibility of the testimony
13 or any item of the testimony. You may consider contradictions
14 within a witness' testimony and between the testimony of
15 one witness and that of another.

16 You will remember when you are judging credibility,
17 what we talked about last Friday when you came here to be
18 selected to serve on this jury, that all of the witnesses
19 start out equal as they come before you. It doesn't matter
20 who called them or who they are - each is to be judged
21 on his own.

22 In the end presumably you will find some witnesses
23 more reliable than others, more truthful than others, but
24 that is not a function of their status or the side they are
25 supposedly on, it is a function of your judgment of each of

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2 them as individual human beings.

3 If you find that a witness has given you in-
4 accurate or false testimony you will want to consider, as
5 I said or indicated, whether that was the result of a lie
6 or a mistake. You will want to consider whether any inaccura-
7 cies related to things central in the case or to peripheral
8 or incidental things.

9 This is true of all defects in the testimony.
10 Consider whether any inaccuracy, any contradiction, any
11 inconsistency, suggests to you a deliberate intention to
12 mislead you or some accident of human fallibility and
13 make your judgment of credibility accordingly.

14 If any witness in your judgment has wilfully
15 testified falsely to you about a fact material in the
16 case it is up to you to decide and you are free to decide
17 whether you will reject all of the testimony he gave you,
18 or you may credit such parts of the testimony as you find
19 believable and useful for your critical task of finding
20 the truth.

21 Now, in considering credibility we are all in
22 the habit from time to time of considering the interest
23 or motive of a person who tells us some alleged fact or
24 other. It is obviously a factor that we weigh together
25 with other factors in deciding how far we may rely on any

1 jwh24

2 account given to us by somebody about something of con-
3 sequence. It is a factor that you will weigh and consider
4 together with other factors bearing on credibility. You
5 know, for example, whether it was mentioned to you or not,
6 that a law enforcement officer may have an interest in
7 the outcome of the case with respect to which he has taken
8 official action. You will know at the same time that the
9 fact that a law enforcement officer has an interest in
10 enforcing the law does not by any means signify that you
11 can't rely on his testimony.

12 You will know that a defendant who takes the
13 stand in a criminal case has a deep and obvious interest
14 in the outcome of that case. Again you will know by the
15 same token that the fact that a defendant has an interest
16 does not signify that his interest is for that reason to
17 be rejected. In other words, generally the existence of
18 an interest doesn't mean that the witness is to be disbelieved.
19 If it meant that we would solve the problem by never allowing
20 interested people to testify.

21 I call your attention to this subject of interest
22 merely to remind you, as I say in general and soon in somewhat
23 more specific terms, of a factor that you are to consider
24 with the others in making judgments about credibility.

25 Then, as I have indicated, there is one aspect

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2 of this subject of interest that will presumably play a
3 special part in your deliberations as it has in the summation
4 you have just heard. That is the subject of so-called in-
5 formant's testimony and that involves some special observa-
6 tions about the witness Marrell Tyre who came before you
7 as an informant in this case.

8 In thinking about that you will realize that the
9 government, the prosecution frequently considers itself
10 compelled to rely on the testimony of an informant, of persons
11 who have themselves engaged in criminal conduct who come
12 to testify in prosecutions against other people. The prosecu-
13 tion takes the position, and there really isn't any quarrel
14 about the legitimacy of his position, that it must take
15 the witnesses as it finds them in performing the function
16 of enforcing the criminal law. In any event, there certainly
17 is no prohibition against the use of informants in the trial
18 of criminal cases.

19 You are instructed, however, that you must
20 scrutinize the testimony of an informant with particular care
21 and deal with it with particular caution in determining
22 whether you will find it to have been credible. You want to
23 take into account the evidence you heard and the arguments
24 you have heard as to what may have been the motive of Mr. Tyre
25 in giving the testimony that you heard. Was Mr. Tyre's

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2 testimony a fabrication in whole or in some critical part
3 induced by benefits that he expected or hoped to receive
4 for that? Was he lying because of some promise or some
5 belief that he might receive favorable consideration in
6 connection with his own difficulties with the law?

7 Or did he, whether in the exercise of conscience
8 or in an astute judgment as to his own selfish interest,
9 did he take the stand and tell you the truth, wholly or in
10 part?

11 Do you believe that he would curry favor with the
12 prosecutor or with law enforcement officers by lying, perhaps
13 to them, and to you, or did he think it best, whether in his
14 selfish interest or otherwise, to come here and tell the truth
15 as he swore he would do?

16 Did he in short believe that it would be best
17 for him, for whatever reasons he can in this picture affecting
18 himself, did he think it would be best for him to make false
19 accusations or to tell truthfully denuding things that he knew
20 or was in a position to know firsthand?

21 Now, those questions are of such a nature that, as
22 I say, you would presumably be considering them in any event
23 in appraising the credibility of Mr. Tyre. In the end with
24 Mr. Tyre, with any witness, you put together all the factors
25 that your judgment would direct you to consider in making

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2 your overall determination as to credibility.

3 Now, as to that, as we approach the end of these
4 instructions, in judging credibility, in judging all the
5 questions that will be left with you now, remember that
6 there will be 12 of you in the jury room. That means obviously
7 that you are expected to go to the jury room and reasonably
8 get together. It means that each of you is not only entitled
9 but expected to contribute your own wisdom and your own
10 thought to this collective task of judgment.

11 By the same token, it means that each of you will
12 go to the jury room prepared to listen courteously and
13 thoughtfully to the views expressed by your fellow jurors.

14 I think you know, but just in case I remind you,
15 that in order to reach any verdict either way on either
16 defendant you must be unanimous. At the same time the unani-
17 mous verdict of the jury must represent the individual
18 judgment and conscience of each member of that jury. That
19 means that if you are reasoning together and you are led ra-
20 tionally to believe that a view you heard at an earlier time
21 was wrong you won't hesitate to change it. It means also
22 that if you hold a view in good conscience you won't feel
23 obliged to or permitted to give it up just because you happen
24 at some point to find yourself in a minority.

25 Now, if during your deliberations you think

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2 you want to hear any part of the testimony again or see
3 any of the exhibits send us a note through your foreman
4 and we will find what it is you need and supply it to you.

5 If you need to hear any of these instructions
6 again send us a note about that and we will try to comply
7 with that request.

8 If you are sending a note at any point and you
9 are divided at that particular time don't tell us how the
10 vote stands, don't tell us the division. It is a private
11 matter for the jury and not one that we ought to be involved
12 in.

13 Remember what I have stressed earlier; there are
14 two separate individual defendants on trial here. You are
15 to reach a separate and distinct verdict on each of them.

16 Our practice in this court is to have verdicts
17 delivered orally in open court rather than in a note. So
18 when you reach a verdict you will let it be known and come
19 in here and your foreman will announce it on your behalf.

20 Before I let you retire let me consult with
21 counsel and see if there are exceptions or other additional
22 different things they want told to the jury.

23 Does anybody want to come to the side bar?

24 MRS. BARTON: No, your Honor.

25 THE COURT: Mr. Curley?

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2 MR. CURLEY: No.

3 MR. FORTUNA: The government has no exceptions.

4 THE COURT: In that event let us have the
5 marshal sworn and the jury may retire.

6 (Deputy marshal sworn)

7 THE CLERK: The jurors will please go with the
8 marshals.9 (The jury left the courtroom at 12:34 P.M.
10 to commence deliberations.)

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EXHIBIT 12

A 38

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA

-v-

FRANK WINGATE and
KENNETH LUKE SMITH,

Defendants.

NOTICE OF MOTION

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavit of ROBERT A. KATZ, ESQ. duly sworn to the 13 day of November 1974, the indictment and superseding indictment herein and upon all of the proceedings heretofore had herein the undersigned will move this court before the Honorable Marvin Frankel on the day of November 1974 for an order

1. requesting the court to allow the defendant Smith an examination of the Grand Jury minutes upon which rests the indictment and superseding indictment.
2. Pursuant to Rule 16 of the Federal Rules of Criminal Procedure permitting defendant Smith to inspect copy and/or photograph material which requests therefor are annexed hereto and made a part of the instant notice of motion (Exhibit A).

3. Pursuant to Rule 7F of the Federal Rules of Criminal Procedure directing the United States Attorney to serve and file, in writing, a bill of particulars as to the indictment and superseding indictment herein, said requests are annexed hereto and made a part of the instant notice of motion (Exhibit B).

4. Pursuant to Rule 41 of the Federal Rules of Criminal Procedure suppressing the statements of the defendant Smith any statements of the co-defendant Wingate or any named co-conspirator and all recordings and wire taps on the ground that such statements or recordings violate the rights of the defendant Smith and more particularly his right under the Fourth, Fifth and Sixth Amendments to the Constitution of the United States of America and defendant Smith requests such other and further relief as to the court may seem just and proper in the premises.

Dated: New York, N. Y.
November 13 1974.

Yours, etc.
BARLOW, KATZ & BARLOW
By Robert A. Katz,
ROBERT A. KATZ
Attorneys for Defendant Smith
233 Broadway
New York, N. Y. 10007
233-0570

TO:

THOMAS FORTUNI, ESQ.
Assistant United States Attorney
Southern District of New York
Federal Courthouse
Foley Square
New York, N. Y.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA

- v -

AFFIDAVIT

FRANK WINGATE and
KENNETH LUKE SMITH,

Defendants.

-----x
STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

ROBERT A. KATZ, being duly sworn, deposes and says:

1. I am a member of the firm of BARLOW, KATZ AND
BARLOW, attorneys for the defendant, Kenneth Luke Smith.

2. I am familiar with the above entitled action in
which the defendant Smith has been charged with having entered
into a conspiracy to violate sections 812, 841(a)(1) and 841(b)
(1)(A) of Title 21 of the United States Code and further with the
substantive counts of attempting to distribute a schedule 1
narcotic drug on two separate occasions.

3. There was no preliminary hearing in this matter
and the evidence was submitted by the United States Attorney
directly to the Grand Jury.

4. After an investigation of the facts including a
conference with Assistant United States Attorney Thomas Fortuni

on the first day of November 1974, I have concluded that this indictment appears to have been procured by evidence which is legally insufficient to support said indictment.

5. It appears that the case against defendant Smith rests upon the mere fact that he was in a car at the airport where the arrest took place. The car ride to the airport is the sole overt act alleged in the indictment. This, it seems, is all the evidence submitted to the Grand Jury, except perhaps, a statement taken from defendant Smith in violation of his 4th, 5th and 14th amendment rights, and tapes recorded in violation of defendant's 4th, 5th and 14th amendment rights. I, therefore, request that the court allow defense counsel to inspect the Grand Jury minutes so that a motion can be prepared to test the legal sufficiency of the indictment.

6. That during my conference on the 1st day of November 1974, Mr. Fortuni informed me that the government would seek to introduce a certain written statement taken by an Assistant United States Attorney prior to defendant's arraignment. This statement was taken while defendant had been in custody for a period of approximately ten to eleven hours. The defendant was admittedly a cocaine addict with a \$30 per day habit. This

raises a serious question as to whether defendant Smith was physically able to understand the statement of rights as read to him. In fact, at West Street, and before defendant was taken to court, he asked for medical treatment which was refused him. The authorities informed him he would be taken care of after he returned from court.

7. The defendant was informed by Assistant United States Attorney Murphey that if he made a statement, he would be placed in TASK and his case dismissed. Further, the statement contains a question purporting to be a waiver of rights. Conspicuously absent is an answer and express waiver by defendant. As further evidence to support the contention that there was no knowing waiver, the question appears to be crossed out, implying that it was never asked. Accordingly, we ask this court to suppress this statement upon the ground that defendant's constitutional rights were violated. MIRANDA v. ARIZONA 384 U.S. 436.

8. That during my conference with Assistant United States Attorney Murphey I was informed that the government would seek to introduce several tape recordings of telephone conversations, ^{Mr. Fortuni} telephone conversation recorded on June 13, 1974 and June 20, 1974. Upon my request to see a wire tap order, Mr. Fortuni informed me that there was no need for one as a party to the telephone call had consented. We are informed by Mr. Smith that he did not consent to this, and we fail to see how an

alleged co-conspirator, co-defendant (Frank Wingate) would knowingly consent to the taping of a conversation, the substance of which might possibly incriminate him. Accordingly, we ask this court to direct that this evidence be suppressed as violative of the defendant's Fourth and Fourteenth Amendment rights.

9. While Mr. Fortuni at our November 1, 1974 conference had informed me that he would provide a written bill of particulars as to dates, times and places referable to the acts of the named parties in the indictment, to date these particulars have not been provided. I therefore annex to this affidavit a written demand for particulars and for discovery. (Exhibits A and B)

WHEREFORE, I move that this court grant defendant Smith's application for:

(1) The inspection of the Grand Jury minutes to test the legal sufficiency of the indictment.

(2) The suppression of the tape recording of June 6, 1974, June 13, 1974, and June 20, 1974.

(3) The suppression of the statement taken from defendant Smith on July 2, 1974.

Sworn to before me this
3 day of November 1974.

Robert A. Katz
ROBERT A. KATZ

DN
New York
11-45
1 in Kings County
Expires March 30, 1978

DISCOVERY

6

1. Permitting the defendant SMITH to inspect and copy or photograph all evidence in the possession, custody or control of the government favorable to the defendants.
- 6
2. Permitting the defendant SMITH to inspect and copy or photograph any written memorandum made by the defendants.
- D
- G
3. Permitting the defendant SMITH to inspect and copy or photograph all evidence that the government will contend at trial was seized from any defendant, or known co-conspirator.

Be

11/17

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA

-v-

DEMAND FOR
BILL OF PARTICULARS

FRANK WINGATE and
KENNETH LUKE SMITH,

Defendants.

-----x
Defendant SMITH by his counsel comes now and hereby
moves this court for an order requiring the United States
Attorney to file a written bill of particulars and allow the
defendant SMITH discovery and inspection of the following items:

1. State the substance of any oral statement made by
any defendant which the government intends to introduce as
evidence at the trial.
2. Without referring to the language of the statute or
the indictment state in what form or manner it will be claimed
that the defendant SMITH did participate in the "distribution"
or attempted "distribution".
3. State the date, time and place including addresses
and apartment numbers where it will be claimed the acts upon
which the indictment rests took place.

FAX-13

D
4. State whether as to any of the acts or conversations intended to be relied upon by the government at trial even though not alleged in the indictment (a) such acts or conversations were had at the instance of the government and (b) whether any person including the defendants or any other co-conspirator, known to the government, participated in, or who arranged for any such act or conversation, was acting at the instance of or on behalf of the government, and if so, identify such individual or individuals, state when, where and with whom they did so, and state whether such individual or individuals were directly or indirectly receiving or promised any money or benefit of any kind from the government.

5. Identify (a) co-conspirators, if any, the government will claim at trial defendants conspired with directly; and (b) any person whom the government will claim acted for or at the direction of the defendant, in connection with the crimes charged.

6. Identify any co-conspirator not named in the instant indictment whose identity was known to the government at the time of the filing of the indictment.

6
7. Identify any co-conspirator not known at the time of the filing of the instant indictment who has since become known to the government.

8. As to each oral statement made by the defendants, if any, which the government intends to introduce in evidence at the trial, state: (a) the substance of such statement; (b) the date, approximate time of day, when, and the place where such statement was made and (c) the person or persons present or overhearing any such statement.

6
9. Whether any information was received by the government, by means of electrical or other mechanical devices, or with the assistance thereof or from any other eavesdropping device, procedure or techniques whatsoever, and if any source of the government's information or evidence was in whole or in part derived from the use of a mechanical device, identify the individual or individuals who used same.

6
10. State whether the government has any knowledge or information if the defendants or either of them were overheard by the government pursuant to an "overhearing device", including but not limited to bugging,wiretapping, etc. If the answer is affirmative, please produce any logs of same.

11. State where and when each defendant had possession of the "cocaine hydro-chloride".

12. State whether each defendant had at any time actual possession known to the government of the "cocaine hydro-chloride".

13. State where, how and in what form each defendant possessed the evidence to be used against him at the trial.

Dated: New York, N. Y.
November 1974

Yours, etc.
BARLOW, KATZ & BARLOW
By _____

ROBERT A. KATZ
Attorneys for Defendant Smith
233 Broadway
New York, N. Y. 10007
233-0570

A 119

At a Trial Term of the United States District Court for the Southern District of New York, on the day of 1974,

PRES^T

United States District Court
Southern District of New York

HONORABLE

MARVIN E. FRANKEL
JUDGE,

-----x

UNITED STATES OF AMERICA

-v-

74 CR 860 (ref)

FRANK WINGATE and KENNETH LUKE
SMITH,

Defendants,

-----x

NOW, upon hearing counsel for Defendant Smith, and Counsel for the Government, and upon the application of Counsel for Defendant Smith for Discovery pursuant to Rule 16 of the Federal Rules of Criminal Procedure, and for an Examination of the Grand Jury minutes, and for a Bill of Particulars pursuant to Rule 7F of the Federal Rules of Criminal Procedure, and for a hearing on the issue of the voluntariness of defendant's statement, and suppression of tape recordings, and further for any material favorable to defendant pursuant to BRADY v. MARYLAND, 373 U.S. 83, it is

ORDERED & ADJUDGED as follows:

1. Defendant's application for inspection of the Grand Jury minutes is denied;

2. Defendant's request for a hearing on the issue of the admissibility of his statement is granted and the hearing is set for the first morning set for trial, provided that an affidavit from the defendant is submitted in support of said motion;

3. Defendant's request for suppression of tape recordings is denied upon the government's representation that defendant SMITH was not a party thereto, nor were there any wiretap orders, and upon the government's representation that a party to the conversations had given consent to the taping thereof;

4. Defendant's request for "BRADY" material is granted;

5. Defendant's discovery request #2 (exhibit A) is granted to the extent that defendant SMITH shall be provided with copies of all statements which he gave to the government or its agents;

5. Defendant's discovery request #3 (exhibit A) is denied; and it further

ORDERED & ADJUDGED that defendant SMITH's request for a bill of particulars is decided as follows:

7. Request #1 is granted as to any oral statements by defendant SMITH, and denied as to any by the co-defendant;

8. Request #2 is granted;

9. Request #3 is granted as to the overt acts and substantive counts;

10. Request #4 is denied;
11. Requests numbered 5, 6, & 7 are granted;
12. Request #8 is disposed of with request #1;
13. Requests numbered 9 & 10 are granted;
14. An answer to requests numbered 11 & 13 shall not be required;
15. Request #12 has previously been answered by the government.

ENTER

MARVIN E. FRANKEL,
Judge, United States District
Court for the Southern
District of New York

G.X. 3501 i.d.

A52-

BND FORM 8 (2/70)

UNITED STATES DEPARTMENT OF JUSTICE BUREAU OF NARCOTICS AND DANGEROUS DRUGS CASE REPORT		FILE NUMBER C1-74-0350	PROGRAM CODE
DEFENDANTS		IDENTIFIER Exhibit A-3	
Frank WINGATE 1416 Bristow St. Bronx, New York	Jacob EDWARDS 572 East 166th St. Bronx, New York	VIOLATIONS 21 USC 846 21 USC 841 21 USC 812	
Kenneth SMITH 1015 East 221 Street Bronx, New York		JUDICIAL DISTRICT(S) Southern District of New York	
Bernice JONES 400 West 148 Street New York, New York		REPORTED BY Edward Magnuson	DATE 9/23/74

SYNOPSIS

On 6/6/74, SC1-4-0071, advised S/A Baumwald, Miami Regional Office, that he could introduce an agent to Frank WINGATE, a source of supply of heroin in the New York area. On the same date a telephone call was recorded (Exhibit A) at the Miami Regional Office between the informant and WINGATE in which negotiations took place for a 1/8 kilogram of heroin.

On 6/13/74 telephone calls between the informant, P.O. Heyward, acting in a undercover capacity and WINGATE were recorded (Exhibit # B) in which arrangements were made for the sale of the heroin the following day. On 6/14/74 the informant and P.O. Heyward met with WINGATE at the CROTOMA BAR, 1475 Boston Road, Bronx, New York. WINGATE informed P.O. Heyward that his people would be coming to the bar and that the money would have to be fronted. P.O. Heyward then advised WINGATE that he would not front all the money but might front half of it. At this time a green Oldsmobile, license #4E6462, occupied by a unknown black male and female, later identified as Bernice JONES and Jacob EDWARDS, parked in front of the bar. WINGATE then on two seperate occasions exited the bar and engaged JONES and EDWARDS in a conversation after barganing with P.O. Heyward concerning the financial arrangements. P.O. Heyward then gave WINGATE half the purchase price of the narcotics (\$3,000.00 OAF) and WINGATE then exited the bar and departed from the area with JONES and EDWARDS in the green oldsmobile under the surveillance of Group #22 Agents and Officers of the 6th Narcotics Division. Approximately one hour later WINGATE returned to the bar and gave the money back to P.O. Heyward explaining that he believed he was being followed. After a short while negotiations were temporarily terminated.

On 6/20/74 a telephone conversation was recorded (Exhibit #B) between the informant and WINGATE concerning the purchase of the narcotics at a later date.

On July 1, 1974, S/A Baumwald, Miami Regional Office, advised S/A Magnuson that WINGATE had contacted the informant and advised that he (WINGATE) was in possession of the 1/8 kilogram of heroin and was prepared to sell it to SC1-4-0071. Arrangements were then made for the purchase of the narcotics later that evening at Laguadia

SIGNATURE (Agent)

Edward Magnuson

APPROVED (Name and title)
Frank J. Coffey Acting FBI Director

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6:X 3505 i.d.

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POLICE REPORT

PAGE 1

FD-302 (Rev. 1-25-60)

07-14-1974

NEW YORK, NEW YORK

FD-302

Urgent. FBI - New York
[redacted]
cc: [redacted]
FBI - New York
Special Agent
New York, New York
Date: July 3, 1974

87/Indictment, Merle
McGarry, Kennedy, [redacted]

CP: ALBANY PM
[redacted]

RE: Arrest of Frank MCGARRY and Kenneth SULLIVAN

DIST. ATT:

1. References in order to all previous FOIA pertaining to this investigation.
2. On July 1, 1974, SULLIVAN informed the telephone operator advised by SA Dugald, HHCW, P.O., that HE WOULD INVESTIGATE 07-14-1974 and advised that he would be in possession of 1/14/74 information concerning the Kennedy and would be calling to tell the informant to the telephone. SA Dugald upon this telephonically contacted the informant and instructed him to contact 07-14-1974 and make arrangements for the purchase of the Kennedy letter that evening at LaGuardia Airport.
3. At approximately 11:30 p.m. on July 1, 1974, to the presence of SA Dugald and Sullivan, and the operator of the C-900-A-074 and advised him that he would be at the airport at 11:30 p.m. to take the letter there. SA Dugald told the informant that he would meet him on the street, and to call him again when he arrived in LaGuardia.
4. At approximately 11:30 p.m. on July 1, 1974, 07-14-1974, in the presence of SA Dugald and Sullivan was made a call to 07-14-1974 at the C-900-A-074 and told him that he was in New York and asked him to bring the letter to the airport. SA Dugald informed 07-14-1974 that he and his son would meet him in front of the American Airlines Office in LaGuardia Airport in 15 minutes to make arrangements for the sale.
5. At approximately 11:45 p.m. Sullivan and established in the vicinity of the American Airlines Office on the main terminal/airline building at LaGuardia Airport from where he advised he intended to leave at approximately 2:15 A.M., 07-14-1974 met with the informant in the vicinity of the American Airlines Office. A short time later, Sullivan observed a man in negro, later identified as Kenneth SULLIVAN, walking from the building upon advice from the American Airlines Office, and joined 07-14-1974 and 07-14-1974. About ten minutes later, 07-14-1974 left.

From:

district:

other:

11

FD-302 (Rev. 1-25-60)
U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

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REPORT OF THE COMMITTEE

(Continued)

THE JOURNAL OF

6

the informant and I left and returned to the car and took shore before boat from sight due to the poor lighting conditions of the river, at approximately 2:45 AM, S/M's companion observed a 1977 white Pontiac, license plate 777-144, driven by S/M, arriving in the area near the informant's residence. At 3:15 AM, the informant found S/M in his vehicle which proceeded to the far north end of the residential area. S/M stated he had come to that location to survey the area. S/M got out of the vehicle and went into the house. The informant and S/M's companion and S/M's son entered the vehicle and remained in the vehicle until approximately 4:30 AM and re-entered the vehicle.

7. After said being advised of his constitutional rights in 8/1/60 interview at the 22nd, SUTP expressed a desire to associate with the Government, and advised Agents Johnson and Baldwin that he could help to obtain the busses for the GOMC from the GOMS the busses that 22nd Street bus line Negley connection. He further advised that his relatives were in the 18th Street, Washington D.C. area United States traffic, resides at 1830 United Street, house #1, Washington, D.C. After 1830 processed, SUTP and family were to go to the 18th Street Station on 18th Street, Pennsylvania Avenue.

6. At approximately 11:30 A.M., the defendant was transported to the Federal Courthouse, D.F.Y., where he was first advised of his rights prior to arraignment. After being advised of his constitutional rights by APBA lawyer, SHAW selected the case notes that had been prepared for him to the Agent. On the same date, D.F.Y. and D.C. were presented before U.S. Magistrate who at the 8:45 A.M. held the arraignment of the amount of \$5,000.00 cash security. SHAW was released on his own recognizance with the condition that he report to the F.B.I. (Treatment Alternative to Incarceration) no later than next day.

PHYSICAL DESCRIPTION:

Frank MCGAUGHEY black male, 5'11", 170 lbs., brown eyes, black hair, mustache, goatee. ARRESTED yesterday on 11/10/50 at Hartsville, South Carolina, and has HYPD B-666229 and FBI 204-176-8.

Kenneth Sillit: Black swans, shelducks, 173 tawny, 1000 egyptian, black-fronted, pintail, widgeon, and coots. Sillit was also involved in the breeding of swans, and has 101-117 sw.

G.R. 3501 i.d.

ASS

UNITED STATES GRAND JURY
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA :
-----X

-v-

FRANK WINGATE and KENNETH LUKE SMITH :
-----X

United States Courthouse
Foley Square
New York, New York

August 15, 1974
10:35 o'clock a.m.

APPEARANCES:

HARRY BATCHELDER, Esq.,

Assistant United States Attorney.

Frank Gemmati
Acting Grand Jury Reporter

Magnuson 8-15-74

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EDWARD MAGNUSON, called as a witness, having been duly sworn by the Foreman of the Grand Jury, testified as follows:

BY MR. BATCHELDER;

Q Would you state your name?

A Edward Magnuson.

Q What is your occupation?

A Agent for the Drug Enforcement Administration

10 Q How long have you been an agent for the Drug
11 Enforcement Administration?

12 A Twenty-six months

13 Q Calling your attention to June 6, 1974, did you
14 have occasion subsequent to that to receive a tape from your
15 Miami office in respect to a conversation that took place
16 between one Frank Wingate and a confidential informant?

17 A Yes, I did.

MR. BATCHELDER: Now, ladies and gentlemen, the evidence you are to hear now is what is known as hearsay evidence.

That is, this man was not present there at that time. You are to examine this evidence closely. He can identify the voices for you but with respect to how the transmission was made, it is simply hearsay evidence which you should

Magnuson 8-15-74

3

examine closely.

BY MR. BATEELDER:

Q Was this tape recorded in the Miami office?

A Yes, it was.

Q And was it recorded pursuant to a recording device that was placed on a telephone and put in the record

A Yes.

9 Q Have you ascertained the recording from the
10 individual sent to you?

A Yes.

12 Q I show you this tape and ask you if you can
13 identify it?

A That's correct. This is the tape I received.

Q Do you recognize the voices on this cassette?

A Yes, I do.

17 MR. BATCHELDER: Ladies and gentlemen,
18 with the Foreman's permission, I would like to
19 play this cassette for you.

20 BY MR. BATELDER:

Q Is the person identified as Frank Daniels now known to be Frank Wingate?

A Yes, that is right.

24 MR. BATCHELDER: Let the record reflect
25 that I am now commencing to play the tape.

ASB

Magnuson 8-15-74

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[Playing of tape recording.]

[WITNESS EXCUSED]

[Time noted - 10:50 o'clock a.m.]

EDWARD MAGNUSON, having been recalled, testified further as follows:

[Time noted - 11:25 o'clock a.m.]

BY MR. BATCHELDER:

Q Special Agent Magnuson, did you subsequently in early July or late June ascertain from Special Agent Baumwald (phonetic) that Wingate had called the informant?

A Yes, I did.

Q And that Wingate was in possession of an eighth of a kilogram of heroin and would be willing to sell the narcotic to the informant?

A Yes.

MR. BATCHELDER: Ladies and gentlemen, this is hearsay testimony, what the informant told Baumwald and what Baumwald told the agent. If you wish to have the agent brought up you may do so.

BY MR. BATCHELDER:

Q Did you then call the informant and say to the informant to come up to New York? ONLY COPY AVAILABLE

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Magnuson 8-15-74

5

A Yes, I did.

Q And that you should make arrangements to purchase the heroin from Wingate at LaGuardia Airport on that evening which would be July 1st?

A Yes, I did.

Q About 10:30 in your presence did you hear the informant call Wingate at the LaCrotona Bar and advise Wingate that the informant would be at LaGuardia Airport at 11:30 that evening and that Wingate should come there?

A Yes, I did.

12 Q And that Wingate should bring the heroin to the
13 airport?

14 A Yes, I did.

15 Q Did Wingate then say that he and his man would
16 meet the informant in front of the American Airlines office
17 at LaGuardia Airport in forty-five minutes to make the sale

A That was after the 1:30 phone call.

19 Q And about 2:10 was surveillance established in
20 front of the American Airlines office and at 2:15 did Win-
21 gate meet with the informant?

A Yes.

23 Q Did you then later see another male, later
24 identified as Kenneth Luke Smith in front of the American
25 Airlines office?

AEO

Magnuson 8-15-74

6

A Yes.

Q About ten minutes later did Smith leave the informant and Wingate and leave the parking lot where he was?

A Yes.

Q At 2:35 did Wingate leave the informant and get in a vehicle and proceed to the far end of the terminal building and did Wingate get out and did he proceed to sort of counter-surveillance the area?

A Yes.

Q Could you explain what counter-surveillance means?

A To put it into very easy terms we were watching him and he was watching us.

Q Did Smith then drive around the airport under the surveillance of yourself and return to that main terminal building and did Wingate get back in a car?

A That's correct.

Q Did you also ascertain from Special Agent Sullivan that the informant, and again this is hearsay testimony, that Wingate had threatened the life of the informant and that he believed police were in the area?

A That's correct.

At about three o'clock did you place Wingate and

Magnuson 8-15-74

? 2 || Smith under arrest?

3 || Yes, I did.

4 Q After you placed these people under arrest, did
5 you advise these defendants of their Constitutional rights?

6 | Page

7 Q Their rights to remain silent, to have an attorney
8 present, that if they didn't have a lawyer one would be
9 appointed, and that they need not make any statements and
10 that any statements they made would be used against them in
11 a court of law?

12 Yes

13 Q Did Kenneth Smith indicate that he was going to
14 obtain the heroin from a Bumsy?

15 A. that's correct.

16 Q Did he say anything with respect to whether Win-
17 gate would go through with the deal on the evening provided
18 money was shown to him or anything else to that effect?

19 A What he said was that Wingate was planning on
20 having us give him the money and he, Kenneth Smith, was goi
21 to obtain the heroin from Wingate and give it to us but he
22 refused to do this when he believed there was the presence
23 of the police and he threatened the SCI.

24 Q Was the telephone conversation between the info
25 ant and Wingate at the LaCrotona Bar taped?

6X389 i.d.

163

ugust 15, 1974

Re: Frank Wingate & Kenneth Luke Smith

MR. BATCHELDER

Witness: ROBERT J. HAYWARD

ROBERT J. HAYWARD, called as a witness, having been duly sworn by the Foreman of the Grand Jury, testified as follows:

BY MR. BATCHELDER:

Q May we please have your full name?

A Robert J. Hayward.

Q Your occupation, please? A N.Y. City Police office assigned to the Sixth Narcotics District as an undercover investigator.

Q Now, calling your attention to June 13, 1974, about 8:30 that evening, did you telephonically contact Frank Wingate at his residence? A Yes, I did.

Q Was that conversation recorded, with the permission of the Court? A Yes, it was.

Q Now, I show you what has been marked as Grand Jury Exhibit "B" for identification, and ask if you recognize that? A Yes.

Q Is that the tape of that conversation? A Yes, it is.

Q MR. BATCHELDER: Ladies and gentlemen with the Court's permission, and the Grand Jury's permission, the Foreman of the Grand Jury's permission, I'd like to play this tape for the Grand Jury.

Q Play on. Can you recognize the voices of the that tape? A Yes, I can.

Q And they are - ? A Frank Wingate, and the informant.

(THE TAPE IS PLAYED) ONLY COPY AVAILABLE

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8/15/74

RSK-2 (for EJC)

Hayward

Q Subsequent to that telephone conversation, did you have occasion, on the following day, to talk with the informant, and did you at about four o'clock, wearing a Kel transmitter, go to the Crotona Bar, in possession of \$6200?

A Yes, I did.

Q Did you have \$5200 of Drug Enforcement funds, and \$1,000 of New York City Police Department funds?

A Yes.

Q At about four or five, did you enter the bar, and observe three black males sitting at the bar, near the door, and did you walk to the rear of the bar, and wait for the arrival of the informant?

A Yes, I did.

Q A short time thereafter, did the informant enter the establishment and speak to one of the males at the bar, and bring the subject over to you and introduce him to you as "Frank"?

A Yes.

Q And you subsequently know that person as Frank Wingate?

A Right; yes.

Q Was that the person who was speaking on that tape, also?

A Yes, he was.

Q Did you have a conversation with him, and he said that since he had missed his man, he would catch him at home, and did you ask him how the deal would go, and did he say the money "has to be fronted"?

A Yes, he did.

Q Which means the money had to be given to him before he would get the drugs and come back, - correct?

AES

RSK-3 (for EJC)

8/15/74

Hayward

A That's correct.

Q Did you tell him that you wouldn't let the money go, and Wingate stated that maybe the main man would bring it with him? A Yes.

Q After a few phone calls by Wingate, did you, -- did he advise you that his people would be coming to the bar and still wanted the money fronted? A Yes.

Q Did you tell him to call the deal off, and say you wouldn't let all the money go; maybe half of it, but not all of it, and did Wingate say his man had to have all the money up front? A That's correct.

Q About six-twenty, a green Oldsmobile Tornado pulled up in front of the bar, and Wingate - did Wingate go outside and speak to the people, the occupants, - a male and a female? A Yes, he did.

Q When he reappeared, did he ask you what you had decided to do, and did you state that you wanted the narcotics, but since Wingate wouldn't take half, and bring it back, there was nothing he could do? A That's correct.

Q Did Wingate leave the bar and return to the automobile, and speak to the occupants of the car?

A Yes.

Q And did he then say that his man would take half of the money, and come back and deliver the package, and you would give him the other half? A That's correct.

ATC

RSK-4(for EJC)

8/15/74

Haywood

Q Did you then go to the men's room, at this time, when you gave Wingate \$3100 for the narcotics, and at about 6:35, did he leave the bar and enter the green Oldsmobile, with the original occupants, and leave? A Yes.

Q At about 7:40, did he again reenter the Crotona Bar, and state that he believed he was being followed? A Yes.

Q And did he return the \$3100 to you?
A Yes, he did.

Q At about eight o'clock, did you, the informant and Wingate, leave the bar and go over to your automobile?

A Yes.

Q After a brief conversation, did you depart the area with the informant, and state that the informant would get in touch with Wingate when the heat died down?

A That's correct.

MR. BATCHELDER: Ladies and gentlemen: I have no further questions of this witness, and I would ask that the Grand Jury please vote on this indictment, which charges two attempts; thank you very much. Does anybody have any questions of this witness?

FOREMAN: You're excused.

(WITNESS LEAVES ROOM)



KENNETH SMITH

AFT

Form No. USA 33s-306 p. 1
Rev. 10/28/71

STATEMENT OF DEFENDANT BEFORE ARRAIGNMENT
MADE TO ASSISTANT UNITED STATES ATTORNEY

Date: 2-2-71
Time Interview Commenced: a.m., 2:15 p.m.

Q. My name is John J. Quinn, I am an Assistant United States Attorney. You have been arrested for a violation of 26 U.S.C. § 5201 which relates to obstruction of justice. In a few minutes you will be taken before the United States Magistrate who will fix bail in your case. Do you understand that?

A. Pig.R.

Q. You have a constitutional right to refuse to answer any of my questions. Do you understand that?

A. Pig.R.

Q. You have an absolute right to remain silent, and if you choose to answer any questions, any statement you do make can be used against you in a court of law. Do you understand that?

A. Pig.R.

Q. You have a right to consult an attorney and to have that attorney present during this interview. Do you understand that?

A. Pig.R.

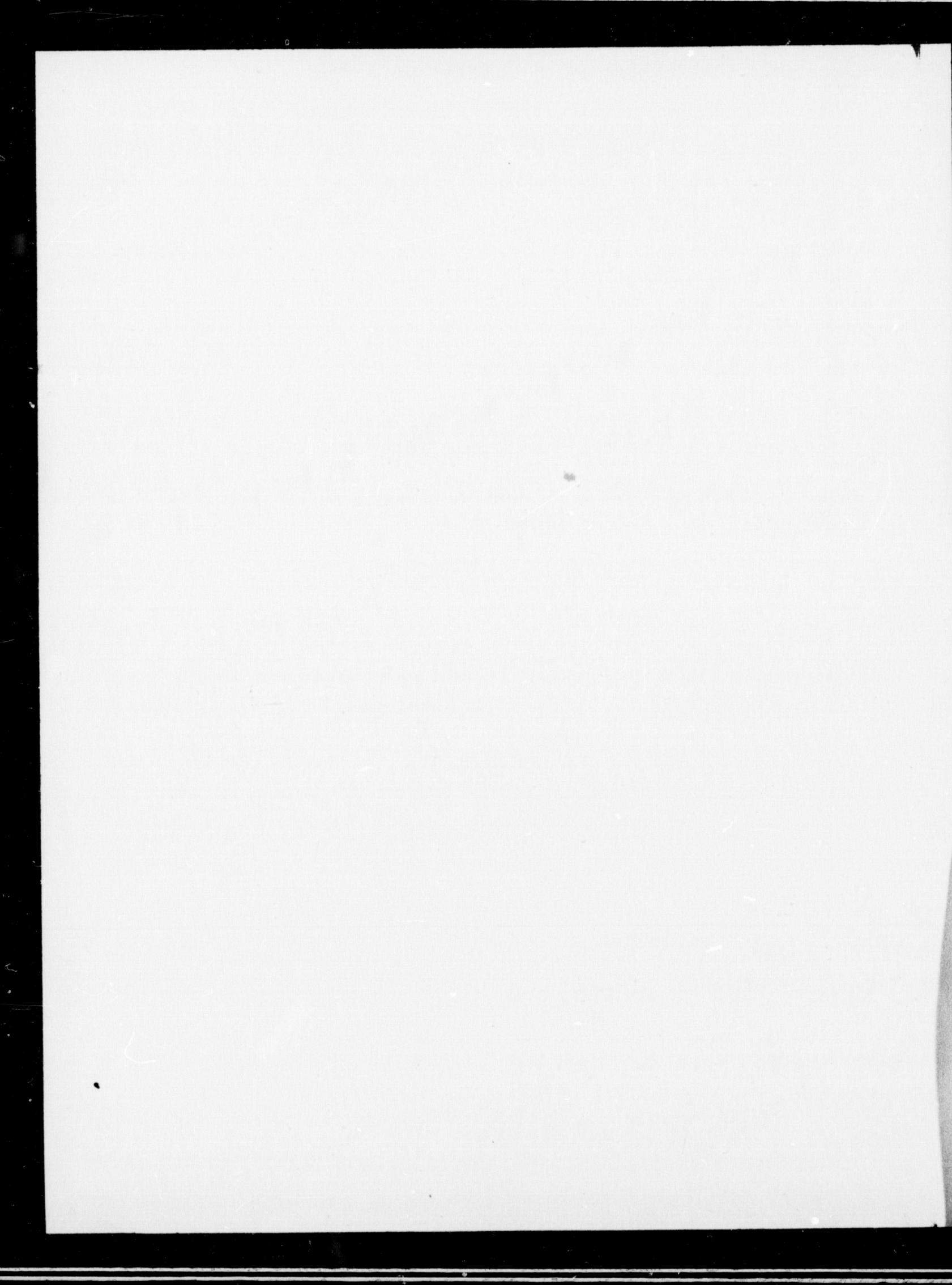
Q. If you do not have funds to retain an attorney an attorney will be appointed to represent you and you do not have to answer any questions before this attorney is appointed and you can consult with him. Do you understand that?



A. Right

Q. Understanding your rights as I have explained them, do you want to give me some information at this time about your background and your version of the facts?

A.



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Name: Karen Smith

Marital Status: Married Age: 31-4-30

Aliases: None

Brown, 1961.

S.S. # 042225371

Children: None Not in living Other Dependents: None

Address: 1015 East 22nd Street

Bronx, N.Y. 10503

Apt. No.

Rent:

Period:

2nd floor

\$125

9 months

With Whom Residing: Wife

Citizen of: U.S.A

Registered as an Alien: -

Entry to U.S.

Registered with Selective Service
Military Service, Discharge: -

Employed:

Wages: 8 dollars/hour plus KFC, Bonus, etc.

Social Service, Financial & Military Inc.

Ex. as a client to Doctor.

Addict:

Yes. 30, 1/2g cocaine.

Smokes a little pot.

Defendant's Statement:

Q. You told the agent you were going to get the heroin from Bumpy, is that right?

A. That's right.

Q. How much heroin was it?

A. Well, he didn't want me to tell him how much he was gonna pay him so I thought I would just say \$200.

Q. Was Bumpy waiting for you last night?

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A. No.

UNL

Q. Where were you going to get in touch with Ross.

A. At the office of the newspaper in the City of New York.

Q. Where's Burns' Office?

A. 22 Broad Street.

Q. That's in your

A. No.

Q. What's Bumpy Louis like.

A. Short, stocky man, brown hair & eyes.

Q. Does Re-Pete bump on his car.

A. Yeah, driving bumper.

Q. What about R.

A. Black.

Q. Where does Re-Pete live on 22nd Street

A. Second floor, 1063.

Q. How much were you going to get for this.

A. I couldn't tell you. I'd probably have took some of it. Took some of the money. There was some money.

Q. I show you this statement, read it, if you have any corrections, make them, if it's true and correct sign it.

A. James Smith

A7D

Defendant's Statement continued:

Time Interview Terminated: 11:30 a.m. 11:30 p.m.

Witnessed: Assistant U.S. Attorney John W. Ritter

Agents: John G. O'Toole 977-8356

Bail recommended:

Ron G. TASC

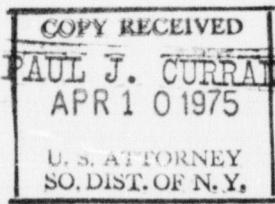
Possible bail suggested
by defendant:

Bail set by Magistrate:

Hearing: 7-22-74

Time of
arraignment: a.m. 8:20 p.m.





Copy of brief received
on behalf of
E. G. D.



